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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

(THOMAS WILSON), W. C. CANEER and MILLIE A. SOWELL, Petitioners, vs. STATE ex rel. W. D. McGEE, Treasurer and Ex Officio Collector of Dunklin County, Missouri, for the Use and Benefit of Drainage District No. 4, etc., Respondent.	No. 361.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

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(THOMAS WILSON), W. C. CANEER and MILLIE A. SOWELL, Petitioners, vs. STATE ex rel. W. D. McGEE, Treasurer and Ex Officio Collector of Dunklin County, Missouri, for the Use and Benefit of Drainage District No. 4, etc., Respondent.	No. 361.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Missouri is reported as State ex rel. McGee, Collector, for the Use and Benefit of Drainage District No. 4, etc., v. Thomas Wilson et al., 220 S. W. (2d) 6 (not yet officially reported). Copy of opinion (R. 79-85).

OTHER OPINIONS INVOLVED.

The opinion of the Missouri Supreme Court, Division 1, reported in State ex rel. Dunklin County, Collector, to Use of Drainage District No. 4, etc., v. Redman, 270 Mo. 465, 194 S. W. 260.

The opinion of the United States Court of Appeals reported in Drainage District No. 4 v. Murphy, 119 Fed. (2) 390.

The opinion of the United States District Court, Honorable George H. Moore, Judge (not reported), contained in Plaintiff's Exhibit No. 270, pages 43-50, filed in this Court.

The opinion of the United States District Court in Murphy v. Drainage District No. 4 et al., reported in 17 Fed. Supp. 128.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Whether this court will issue a writ of certiorari where (1) the petitioners failed to raise a federal question in their pleading in the trial court because they only made general reference to certain sections and amendments of the Constitution of the United States without showing how same were violated; (2) during the trial there was no objection based on a violation of a federal law or the federal Constitution, the objections being limited to alleged violations of the state Constitution; (3) the trial court in its decision failed to mention or decide a federal

question; (4) petitioners in their brief on the appeal to the Supreme Court of Missouri expressly stated that the case involved only a question of state law and no federal law was in any way involved and failed in their Points and Authorities and Argument in said brief to make reference to a federal question; (5) the Missouri Supreme Court in its decision failed to mention or determine a federal question; (6) in petitioners' Motion for Rehearing and in the alternative Motion to Transfer to Court en Banc and Suggestions in Support Thereof, no mention was made of a federal question and (7) the federal questions mentioned in petitioners' application to this court are no longer open questions in this court and the decision of the Missouri Supreme Court is in accord with the applicable decisions of this court.

STATUTES INVOLVED.

Section 57 of the 1919 Act of the Missouri Legislature, now Section 12454, Revised Statutes of Missouri, 1939 (See Appendix);

Section 17 of the 1919 Act of the Missouri Legislature, now Section 12413, Revised Statutes of Missouri, 1939 (See Appendix);

Article 4 of Chapter 41 of the Revised Statutes of Missouri, 1909, as amended by Laws of Missouri, 1913, pages 271-281.

STATEMENT.

Suit was filed by the Respondent in the Circuit Court of Dunklin County, Missouri, to enforce and collect certain supplemental drainage district assessments levied in 1941 by Drainage District No. 4 of Dunklin County, Missouri, against lands embraced in said Drainage District. The supplemental assessment was made pursuant to the mandate of the United States District Court for the Eastern Judicial District of Missouri, Southeastern Division, which mandate was affirmed by the United States Circuit Court of Appeals, 119 Fed. 2d 390. The Petitioners for the writ of certiorari in this Court filed an answer wherein they alleged that for the Court to sustain the said assessments would be violative and contrary to the V Amendment and XIV Amendment and Section 10 of Article I of the Constitution of the United States (R. 17, 23). The trial court found in favor of the Defendants (Petitioners here), holding that a previous decision of the Missouri Supreme Court, **State ex rel. Douglass v. Redman**, 270 Mo. 465, 194 S. W. 260, was res judicata. It made no mention of a federal question being involved and did not determine any federal question (R. 62-68). On appeal to the Missouri Supreme Court, Petitioners in their brief stated that the case before that Court devolved upon a question involving state law as there was no federal law in any way involved in the case. In their Points and Authorities and in the argument contained in said brief, they made no mention of a federal question. (See Stipulation, Appendix to this Brief, pp. 29 to 33). The Missouri Supreme Court in its opinion (R. 79-85), 220 S. W. 2d 6 (not yet officially reported), ruled that the Appellant was not barred by State ex rel. Douglass v. Redman, supra, but that the defendants were barred by the judgment of the United States District Court in Murphy v. Drainage Dis-

trict No. 4, 17 Fed. Supp. 128, and the judgment of the United States District Court (not reported) contained in Plaintiffs' Exhibit No. 270, pp. 43-50, filed in this Court that was affirmed by the United States Circuit Court of Appeals (Eighth), 119 Fed. 2d 390, directing by mandamus the Drainage District to make the supplemental assessments which this suit sought to enforce. It further held that the 1913 Act of the Missouri Legislature in 1913 Laws of Missouri, pp. 271-281, authorized such supplemental assessment and that said 1913 Act did not contravene the constitution of the State of Missouri. In defendants' Motion for Rehearing and in the Alternative Motion to Transfer to Court en Banc and Suggestions in Support Thereof, no mention was made of any federal question (R. 86-107). Subsequently, the Defendants filed a petition in this Court for a writ of certiorari to the Supreme Court of the State of Missouri.

SUMMARY OF ARGUMENT.

I.

The petitioners not only failed to raise or preserve a federal question, but if they did, they expressly waived such federal question in their brief which they filed in the Supreme Court of Missouri, wherein they said:

> "This case devolves upon a question involving state law as there is no federal law in any way involved in the case."

The Points and Authorities and Argument contained in said brief made no reference to a federal question.

II.

The Missouri Supreme Court has held that not only must a federal constitutional question be raised at the earliest practical opportunity in the trial court, but it must be kept alive throughout the whole progress of the case. Failure to do so will constitute an abandonment of the constitutional question. The federal constitutional question must not be merely colorable, but it must be a substantial one.

There were not sufficient allegations in petitioners' answer in the trial court to sufficiently raise a federal constitutional question. During the trial there was no objection made based on the violation of the federal law or the federal constitution. The objections were limited to alleged violations of the state constitution. The trial court in its opinion made no reference to a federal question, nor did it decide a federal question (R. 62-68). It is the rule of the Missouri Supreme Court that even if a federal question had been sufficiently raised in the pleadings by a party such question will be deemed to have been abandoned

on the appeal if no reference is made thereto in the Points and Authorities and the Argument contained in the brief filed in the Supreme Court.

III.

Where federal constitutional questions have been waived by failure to follow the procedure designed by the courts of Missouri for the protection of federal rights, same will not be entertained by the United States Supreme Court.

IV.

The decision of the Missouri Supreme Court did not determine a federal question.

The principle has been established by this court that, where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it by certiorari.

V.

Under rule 38 of the United States Supreme Court a writ of certiorari to review a decision of a state court will not issue where a state court has decided a federal question of substance in accord with applicable decisions of this court. The validity of reassessment statutes enacted after the work has been done is no longer an open question.

VI.

The Act of the Missouri Legislature of 1913 involved in this case was not wholly repealed by the 1919 Act. The repeal was limited, since Section 57 of the 1919 Act, now

Section 12454, Revised Statutes of Missouri 1939 (see appendix), provided that the repeal of the 1913 Act should not have the effect of suspending, abating, abridging, impairing, vitiating or nullifying any right, power, remedy or lien theretofore given, created or conferred upon any drainage district organized prior to the passage of said act but that all such rights, powers, remedies and liens are directly preserved to all such drainage districts and that all rights, powers, liens and remedies then existing in behalf of any drainage district might be enforced and made available under the provisions of said 1919 Act, if applicable, at the election of the drainage district.

ARGUMENT.

I.

The petitioners not only failed to raise or preserve a federal question, but if they did, they expressly waived such federal question in their brief which they filed in the Supreme Court of Missouri.

The trial court, Circuit Court of Dunklin County, did not pass on a federal question (R. 62-68).

As appears from the stipulation filed in this court, which is printed as part of the appendix to this brief, pp. 29 to 33, petitioners on page 49 of their brief filed in the Missouri Supreme Court in this case made the following statement:

> "This case devolves upon a question involving state law as there is no Federal Law in any way involved in the case.
>
> "Respondents assert that measured by the yardstick of our State Law and our Missouri Constitution the 1919 Act does not justify the assessment made in this case and will not support it."

It further appears from said stipulation that the points and authorities and argument contained in said brief made no reference to a federal question. See appendix to this brief, pp. 29 to 33. All references are specifically to the Missouri Constitution. An averment that a state statute is unconstitutional and void is not sufficient to raise a federal question but is to be taken as referring to the Constitution of the state, and not to the Constitution of he United States. **Kipley v. Illinois ex rel. Akin**, 170 U. S. 182, 18 S. Ct. 550, 42 L. Ed. 998, 1001; **F. G. Oxley Stave Co. v. Butler County**, 166 U. S. 648, 41 L. Ed. 1149; **Layton v. Missouri**, 187 U. S. 356, 47 L. Ed. 214; **Bowe v. Scott**, 233 U. S. 658, 664, 58 L. Ed. 1141, 1145.

The Supreme Court of Missouri in its opinion treats of the constitutional question raised in the following language (R. 83):

> "Since the county court had the authority at the time it made the original assessment to have made it adequate to pay all of the bonds without infringing any rights of landowners, the Legislature could without depriving anyone of any constitutional rights empower the county court to make supplementary assessments to discharge the bonds without first giving notice to the property owners of the district . . ."

and further on (R. 84):

> "What we have said disposes of the constitutional questions presented by the landowners."

Since only state constitutional questions were presented, only state constitutional questions were determined.

In **International Steel & Iron Co. v. National Surety Co.**, 297 U. S. 657, 80 L. Ed. 961, the court said, l. c. 965:

> "In the course of the opinion the Court said: '. . . our construction of Chapter 80 of the Acts of 1929 does not bring that statute into any constitutional difficulty.' Except for this statement, the record failed to disclose that a question under the Federal Constitution had been presented or decided. In the circumstances, this court had no jurisdiction upon appeal."

No federal question was raised in petitioners' Motion for Rehearing and in the alternative Motion to Transfer to Court en Banc and suggestions in support thereof filed in the Missouri Supreme Court (R. 86-92).

In **Butler v. Gage**, 138 U. S. 52, 34 L. Ed. 869, l. c. 872, this court said:

"The Supreme Court of the State confessedly went to judgment without any suggestion that a federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the court. And the disposition of the motion that oral argument be permitted after the petition for rehearing was denied, did not, in itself, necessarily involve the decision of a federal question.

"We cannot, under such circumstances, reexamine the judgment and orders of that court, and the writ of error must be dismissed."

Rule 38 of the United States Supreme Court, dealing with the granting of writs of certiorari, provides as follows:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

II.

The Missouri Supreme Court has held that not only must a federal constitutional question be raised at the earliest practical opportunity in the trial court, but it must be kept alive throughout the whole progress of the case. Failure to do so will constitute an abandonment of the constitutional question. The federal constitutional ques-

tion must not be merely colorable, but it must be a substantial one.

Petitioners allege in their answer (R. 17) as follows:

> "Defendant further alleges that under the Constitution of the United States, Amendment V, and Section 30, Article 2, Constitution 1875, Section 10, Article I, Constitution 1945, of the State of Missouri, one can not be deprived of their property without due process of law."

And also (R. 23):

> "33. Defendant states that for the court to sustain plaintiff's petition in this case and to sustain the levy of increased assessments on the lands in Drainage District No. 4 to pay the judgment would be violative and contrary to the 5th Amendment, the 14th Amendment and Section 10 of Article I of the Constitution of the United States, and would further be violative of and contrary to Sections 15, 20 and 30 of Article 2 and Section 53 of Article 4, Subdivisions (1), (32) and (33) of the Missouri Constitution, and this defendant specifically pleads the Constitutions of the United States and the State of Missouri as a complete bar to any lawful authority existing in plaintiff to collect any additional levy or assessment against the lands of defendant."

It will be seen from **McGill v. City of St. Joseph**, and other cases, infra, that such allegations are mere statements of conclusions and do not raise constitutional questions.

During the trial there was no objection made based on the violation of a federal law or the federal constitution (R. 37-61). The objections were limited to alleged violations of the state constitution (R. 52-53).

In **McGill v. City of St. Joseph,** 31 S. W. (2d) 1038 (Mo. Sup., not officially reported), the petition contained this allegation (p. 1039):

> "That said ordinance and the provisions complained of are unconstitutional and void, in that they violate the rights guaranteed to plaintiffs by section 4, article II, of the Constitution of Missouri. Said ordinance is also unconstitutional and void and the title thereof defective so that it deprives plaintiffs of rights and property without due process of law as guaranteed by section 30 of article II of the Constitution of the State of Missouri."

The trial court found that the ordinance was not authorized by and in fact was in derogation of the act of the General Assembly and therefore was invalid and unenforcible and further that certain provisions of the ordinance were unreasonable and invalid and therefore the plaintiff was entitled to an injunction to restrain the defendant City from enforcing certain provisions of said ordinance. On appeal the Supreme Court said, l. c. 1040:

> "If we have jurisdiction, it can only be upon the ground that a constitutional question is involved."

Further on the court said, l. c. 1040:

> "The only reference to a constitutional question that appears anywhere in the record of the trial court is the above-quoted paragraph of plaintiff's petition. Viewing that allegation in the most benign spirit, it can hardly be said to present a constitutional question. It states conclusions merely. In State v. Goad, 296 Mo. 452, 246 S. W. 917, 918, we said that 'the mere assertion * * * that the state statute is in conflict with certain numbered sections of the Constitution, without a statement of their nature or the facts which create the conflict, will not confer jurisdiction,'

and in Chapman v. Adams, 230 S. W. 80, 81, that 'it is not sufficient to say, either here or in the trial court, that the judgment violates a certain provision of the Constitution, but it must be made to appear wherein it is alleged to be violated.' In Dorrah v. Pemiscot County Bank (Mo. Sup.), 248 S. W. 960, a pleading no more vague than that in this case was held to state only conclusions and not to raise a constitutional question. See, also, State v. Nece (Mo. Sup.), 248 S. W. 963, and cases cited.

"But if we treat the pleading as sufficient to present a constitutional question, that question has been abandoned and is no longer in the case."

Further on the court says, l. c. 1041:

"Respondent asserts no constitutional question in this court. It does not mention that question in its brief or argument here, but seeks to sustain the trial court's judgment solely on the grounds that the assailed provisions of the ordinance are invalid because in contravention of the statute and because unreasonable. In a similar situation we held in California Special Road Dist. v. Bueker, 248 S. W. 927, that the constitutional question had dropped out of the case. In that case the defendant had raised the question below by its pleadings and objections to evidence, and it had been ruled adversely to the defendant. The defendant won, however, on the facts and the plaintiff appealed. We there said: 'As previously stated, at the time the defendant objected to the offer of testimony, the court ruled in favor of the appellant. The constitutional question was not thereafter raised, either in the instructions given or refused, in the motion for new trial, or in appellant's brief. The respondent concluded to "let the Constitution shift for itself" and has filed no brief. The ques-

tion was not kept alive, and was not in the case at the time the appeal was taken, and is therefore not presented by this appeal. (Citing cases.) It was eliminated in the trial'—citing cases.

"In the instant case appellant, as above stated, does brief the question, but not as an assignment of error, and, moreover, as shown, appellant did not attempt to keep the question alive in the trial court. See, also, Ranney v. City of Cape Girardeau, supra, in which case the constitutional question was raised in the trial court by the plaintiff, who prevailed below, but it did not appear 'that the decree decided any constitutional question adversely to appellant.' It was held that this court was without jurisdiction. In Municipal Securities Corp. v. Kansas City, 186 S. W. 989, which in this regard was similar to the instant case, we held that appellate jurisdiction was in the Court of Appeals. See, also, Brown Shoe Co. v. Aetna Life Ins. Co. (Mo. Sup.), 281 S. W. 963. In that case the record did not show whether the trial court decided the case on the constitutional question or not. The appellant, as here, did not mention that question in its motion for new trial and the respondent who had raised it by its pleading below (also as in this case) did not brief it in this court, wherefore it was held to have been abandoned. See, also, Cooper County Bank v. Bank of Bunceton, 310 Mo. 519, 524, 276 S. W. 622, 624, wherein it is said: 'Whichever party raised the question below may abandon it upon appeal. The contention of unconstitutionality having been abandoned after appeal, the question is no longer in the case, and the only reason for us to retain jurisdiction disappears.' "

In **City of Laclede v. Libby**, 278 S. W. 372 (Mo. Sup., not officially reported), the Missouri Supreme Court held that it was without jurisdiction of the appeal unless the

case was one involving the construction of the Constitution of the United States or of the State of Missouri. The answer pleaded as a defense that the ordinances relied on by plaintiff in its petition were unreasonably oppressive and attempted to take defendant's property and subject it to unreasonable burdens without due process of law as defined by the Constitution of the United States and of the State of Missouri. The court said in its opinion that an examination of the abstract of record disclosed that no claim of a constitutional right was asserted by the appellant at the trial. Neither the motion for new trial nor the motion in arrest of judgment referred to a constitutional question. In determining that the Supreme Court had no jurisdiction, the court said, l. c. 473:

> "While neither party to this action has challenged the right of this court to assume jurisdiction of the appeal, inasmuch as jurisdiction cannot be conferred upon us by silence or consent, we may examine the record and determine therefrom whether we have acquired jurisdiction because of any real, rather than a mere colorable, constitutional question. Burns v. Prudential Insurance Co., 295 Mo. 680, 247 S. W. 159, and cases there cited. Not only must a constitutional question be raised at the earliest practical opportunity in the trial court, but it must be kept alive throughout the whole progress of the case. Lavelle v. Insurance Co. (Mo. Sup.), 231 S. W. 616; Scott v. Dickinson (Mo. Sup.), 217 S. W. 270; Severson v. Dickinson (Mo. Sup.), 248 S. W. 595. Nor will this court retain jurisdiction on appeal if the constitutional question is merely colorable and evidently not one of substance. Lohmeyer v. Cordage Co., 214 Mo. 685, 113 S. W. 1108; Vanderberg v. Gas Co., 199 Mo. 455, 97 S. W. 908; Burns v. Insurance Co., 295 Mo. 680, 247 S. W. 159. We find no constitutional question of substance, presented and decided in the trial court, kept alive during

the progress of the trial, or preserved in the record before us, sufficient to confer jurisdiction upon this court in this cause. Chapman v. Adams (Mo. Sup.), 230 S. W. 80; West v. Dyer (Mo. Sup.), 212 S. W. 880; Hulett v. Railway Co., 145 Mo. 35, 46 S. W. 951; Independence v. Knoepker, 205 Mo. 338, 103 S. W. 940."

In **State ex rel. Luechtefeld v. Arnold,** 144 S. W. (2d) 60 (Mo. Sup., not officially reported), the relator in a mandamus proceeding sought to compel the issuance of permits to build five dwellings in the City of Richmond Heights, Missouri. Refusal was based on a zoning ordinance which authorized dwellings for one family only in the district where relator sought to build. The court found in favor of the respondent. The relator invoked the jurisdiction of the Supreme Court on the ground that there was a constitutional question involved with reference to the zoning ordinance. Relator pointed to certain language in his petition which he claimed raised the constitutional question. Dealing with this point, the Missouri Supreme Court said, l. c. 60:

> "Even if this general statement could be held sufficient to originally raise a constitutional question, we would still have to hold that it has been abandoned on this appeal because there is no reference to any constitutional provision whatever in relator's 'Points and Authorities' or even in the 'Argument' in his brief; instead, relator cites zoning statutes and argues invalidity of the ordinance because of failure of the city to comply with their requirements."

In **Mueller v. Klinhart** (1942), 164 S. W. (2d) 928 (Mo. Sup., not officially reported), the Missouri Supreme Court held that constitutional questions raised in the answer had been waived by failure to preserve same in the defendants'

brief by assignments of error or otherwise. The court said, l. c. 928:

> "Defendants' answer and cross bill attempted to raise some constitutional questions, but these have been abandoned by failure to preserve any such issues in defendants' brief by assignment of error or otherwise. Wright v. Tucker (Mo. Sup.), 137 S. W. (2d) 557; State ex rel. Luechtefeld v. Arnold (Mo. Sup.), 144 S. W. (2d) 60."

In **Wright v. Tucker**, 137 S. W. (2d) 557 (Mo. Sup., not officially reported), where the defendant claimed violation of the due process of law and equal protection of law of the state and federal constitutions, the court held that these constitutional contentions were abandoned by failing to set them out as assignments of error and by not mentioning them in defendant's Points and Authorities or Argument.

In the case of **Bankers' Mortgage Co. v. Lessley**, 31 S. W. 2d 1055 (Mo. Sup. not officially reported), the Missouri Supreme Court said, l. c. 1058:

> "And though timely raised in the trial court, if the constitutional question is not briefed nor urged nor relied upon in this court, it will be deemed abandoned, and, when our jurisdiction depends solely upon such question being involved, we will not retain jurisdiction, even where the case was properly sent here on appeal because of the appearance of such question in the record." See also Homan v. Mo. Pac. R. Co., 64 S. W. (2d) 617, l. c. 621, 334 Mo. 61 (en banc), cert. denied 291 U. S. 683, 78 L. Ed. 1070.

III.

Where federal constitutional questions have been waived by failure to follow the procedure designed by the courts of Missouri for the protection of federal rights, same will not be entertained by the United States Supreme Court.

Central U. Telephone Co. v. Edwardsville, 269 U. S. 190, 70 L. Ed. 229, 46 S. Ct. 90;

Parker v. Illinois, 333 U. S. 572, l. c. 574, 92 L. Ed. 886, 888.

The Supreme Court of the United States in the recent case of **Congress of Industrial Organizations v. Robert E. McAdory**, 325 U. S. 472, 477, 89 L. Ed. 1741, held that the United States Supreme Court would not consider a federal constitutional question in the first instance where the federal constitutional question was not passed on by the Circuit Court (trial court) and was not raised by assignment of error in the Alabama Supreme Court, and that court did not pass on that question in its opinion in view of the fact that the Alabama Supreme Court will not consider errors which have not been assigned. Mr. Chief Justice Stone said:

> "Further the contention that Sec. 16 conflicts with the National Labor Relations Act, cf. Hill v. Florida, No. 811, decided this day (325 U. S. 537, post 1782, 65 S. Ct. 1373), was not passed on by the Circuit Court, was not raised by assignment of error in the Alabama Supreme Court, and that court did not pass on that question either in its opinion in this case or in its opinion in the Alabama State Federation of Labor, U. B. C. J. Case which it adopted as controlling.
>
> "The Alabama Supreme Court will not consider errors which have not been assigned, Rowland v.

Plummer, 50 Ala. 182, 197; Pettibone-Taylor Co. v. Farmers Bank & T. Co., 156 Ala. 666, 46 So. 751; Malaney v. Ladura Mines Co., 191 Ala. 655, 65 So. 666; Nichols v. Hardegree, 202 Ala. 132, 79 So. 598; Halle v. Brooks, 209 Ala. 486, 96 So. 341, or which have not been specifically and precisely raised in the assignments of error, Kinnon v. Louisville & N. R. Co., 187 Ala. 480, 65 So. 397; Carney v. M. C. Kiser Co., 200 Ala. 527, 76 So. 853; Hall v. Pearce, 209 Ala. 397, 399, 96 So. 608; Jackson Lumber Co. v. Butler, 244 Ala. 348, 13 So. (2d) 294, 298. Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here. Caperton v. Bowyer, 14 Wall. (U. S.) 216, 236, 20 L. Ed. 882, 884; Hulbert v. Chicago, 202 U. S. 275, 280, 281, 50 L. Ed. 1026, 1028, 1029, 26 S. Ct. 617; Dorrance v. Pennsylvania, 287 U. S. 660, 77 L. Ed. 570, 53 S. Ct. 222; Chandler v. Manifold, 290 U. S. 665, 78 L. Ed. 575, 54 S. Ct. 93; See also Flournoy v. Wiener, 321 U. S. 253, 88 L. Ed. 703, 64 S. Ct. 548; Charleston Federal Sav. & L. Asso. v. Alderson, No. 400, this term (324 U. S. 182, 185, ante, 857, 860, 65 S. Ct. 624), and cases cited."

Petitioners come within the rule of **Hulbert v. Chicago**, 202 U. S. 275, 281, 50 L. Ed. 1026, where the issue was whether a federal question had been preserved in the State Supreme Court. The court held, l. c. 202, U. S. 280-281:

"We do not think that the plaintiff in error complied with Sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), in setting up a right under the Constitution of the United States. The mere claim in the objections to the confirming of the assess-

ment, never afterwards brought to the attention of the trial court or of the supreme court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States."

Further on the court says:

"Errors assigned, but not noticed or relied on in the brief or argument of counsel will be regarded as waived or abandoned. Keyes v. Kimmel, 186 Ill. 109, 114, 57 N. E. 851. And such rule of practice will be recognized by this court. Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605. It follows that this court has not jurisdiction of this writ of error."

The rule of the Missouri Supreme Court that the mere assertion that a state statute is in conflict with certain numbered sections of the federal constitution is only the statement of a conclusion and does not raise a federal question also prevails in the United States Supreme Court.

Witness, Clarke v. McDade, 165 U. S. 168, l. c. 172, 41 L. Ed. 673, l. c. 674, wherein it is said:

"A general statement that the decision of a court is against the constitutional rights of the objecting party or against the 14th Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a federal question even when the judgment is a final one within the section of the Revised Statutes above mentioned. There must be at least some color of a federal question. Hamblim v. Western Land Co., 147 U. S. 531."

Although the Hulbert case, supra, is concerned with jurisdiction of the Supreme Court on a writ of error, the same rule has been applied in ruling on petitions for certiorari. As said in **Williams v. Kaiser, 323 U. S. 471, 477-478, 89 L. ed. 398, 403:**

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 81 L. ed. 476, 478, 57 S. Ct. 350; Lynch v. New York, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. Missouri, 13 Wall. (U. S.) 257, 263, 20 L. ed. 635, 637; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 297, 35 L. ed. 193, 195, 11 S. Ct. 528; Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; Lynch v. New York, 293 U. S. 52, 79 L. ed. 191, 55 S. Ct. 16, supra."

IV.

Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the United States Supreme Court will not undertake to review it by certiorari.

Williams v. Kaiser, 323 U. S. 471, 477-478, 89 L. ed. 398, 403.

The only real question presented by petitioners to this court is not a federal question. Petitioners assign as a basis of opinion of the state court that the Missouri Supreme Court ruled that the judgment in the case of Joseph D. Murphy v. Drainage District No. 4, 17 Fed. Supp. 128, and the judgment of the United States Court of Appeals in Drainage District No. 4 et al. v. Murphy, 119 Fed. (2d) 390, are res adjudicata, binding upon the landowners and could not be reopened and reviewed (Petition for Writ of Certiorari, 16). It has been several times held by this court that a finding of res judicata by the highest state court is a matter of state law, conclusive on the Supreme Court and not reviewable.

The leading case is Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400.

> "The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question presented by the defense was not whether a federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become res judicata between the parties. Whether an equitable title could be set up in bar of the action at law brought by Gibson, the holder of the legal title, to recover possession, is a question of state law upon which the judgment of the state court is conclusive."

The following is the entire opinion of the court in The City and County of San Francisco v. Itsell, 133 U. S. 65, 33 L. ed. 570.

> "This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal

question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error. Rev. Stat. § 709; New Orleans Water Works v. Louisiana Sugar Refining Co., 125 U. S. 18; DeSaussure v. Gaillard, 127 U. S. 216; Hale v. Akers, 132 U. S. 554.

"In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States. Chouteau v. Gibson, 111 U. S. 200.

"Writ of error dismissed for want of jurisdiction."

In connection with this matter of res judicata, see also Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, 382, 54 L. Ed. 1077-78.

V.

Under Rule 38 of the United States Supreme Court a writ of certiorari to review a decision of a state court will not issue where a state court has decided a federal question of substance in accord with applicable decisions of this court. The validity of reassessment statutes enacted after the work has been done is no longer an open question.

In Lombard v. West Chicago Park Commissioners, 181 U. S. 33, 45 L. ed. 731, this court said, 181 U. S., l. c. 42:

"It is no longer open to question that where a special assessment to pay for a particular work has been

held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work. Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

"With these two propositions in mind it is certain that if the power flowing from the ordinance which the Supreme Court of the State of Illinois upheld existed prior to the work, the assessment was valid. So, also, if the authority was only given subsequent to the work, it was, from the point of view of the Constitution of the United States, legally conferred. In either contingency, therefore, there was no cause of complaint so far as Federal rights were concerned."

In Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, l. c. 360, Mr. Justice Holmes had this to say:

"The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for public work already done (citing cases). If this were not so it might be hard to justify reassessments. * * * A reassessment may be a new assessment. Whatever the Legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free 'to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way. Norwood v. Baker, 172 U. S. 269, 293, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187, 196; McNamee v. Tacoma, 24 Wash. 591, 64 Pac. 791; Annie Wright Seminary v. Tacoma, 23 Wash. 109, 62 Pac. 444.

"We think it unnecessary to consider other questions on the part of the case that we have dealt with. We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original owner. It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning bona fide purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice. See Tallman v. Janesville, 17 Wis. 71, 76; Cooley, Taxn., 3d ed., 527, 528. Indeed, he can not buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and, if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made."

Reassessments without notice have been sustained against federal constitutional objections and, therefore, their validity no longer presents a live constitutional question.

Roberts v. Irrigation District, 289 U. S. 71, 77 L. ed. 1038 (work finished 1920; additional assessment 1931);

Hagar v. Reclamation Dist., 111 U. S. 701, 28 L. ed. 569;

Breiholz v. Pocahontas County, 257 U. S. 118, 66 L. ed. 159.

VI.

Petitioners in their petition, p. 18, state that the Act of 1913 involved in this case was specifically repealed in 1919. They failed to state that the repeal was a limited or qualified repeal; that Section 57 of Laws of Missouri, 1919, pp. 320-321, now Section 12454, Revised Statutes of Missouri, 1939 (see Appendix), provides that the repeal of the 1913 Act shall not have the effect of suspending, abating, abridging, impairing, vitiating or nullifying any right, power, remedy or lien theretofore given, created or conferred upon any drainage district organized prior to the passage of said act but that all such rights, powers, remedies and liens are directly preserved to all such drainage districts and that all rights, powers, liens and remedies then existing in behalf of any drainage district might be enforced and made available under the provisions of said 1919 Act, if applicable, at the election of the drainage district. They merely print the title of the Act as part of the Appendix to their petition for writ of certiorari filed in this court (R. 58). We have set forth in our Appendix that portion of the Act which shows that the 1919 Act is only a limited repeal of the 1913 Act. The reply in the trial court specifically referred to this limited repeal (R. 35).

CONCLUSION.

No federal question having been raised and kept alive and preserved, and, moreover, the decision of the Missouri Supreme Court being in accord with the decisions of this Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID BARON,
Attorney for Respondent.

APPENDIX.

In the Supreme Court of the United States.

State ex rel. W. D. McGee, Treasurer and Ex-Officio Collector of Dunklin County, Missouri, for the Use and Benefit of Drainage District No. 4 of Dunklin County, Missouri, a Duly Organized Drainage District of Said County,

vs.

Thomas Wilson et al.

STIPULATION.

It is hereby agreed by and between the parties hereto that Respondents' Statement, Brief and Argument filed in the Supreme Court of Missouri on the appeal in the above entitled cause contained the following statement on page 49 thereof, to-wit:

> "This case devolves upon a question involving state law as there is no federal law in any way involved in the case.
>
> Respondents assert that measured by the yardstick of our state law and our Missouri Constitution the 1919 Act does not justify the assessment made in this case and will not support it."

The respondents in the Missouri State Supreme Court, Thomas Wilson et al., also incorporated in their brief, pages 19, 20 and 21, the following points and authorities cited thereunder:

"Brief.

(Points and Authorities.)

I.

All questions pertinent to the law of this case has been heretofore settled. In April, 1912, the bondholders sought an additional assessment to cover the bonds which were merged into judgment in the Murphy case and the County Court made the additional assessment requested. But the Circuit Court of Dunklin County ruled such assessments could not be collected and this Court affirmed such judgment. The opinion of this Court constitutes full and complete res adjudicata.

State ex rel. Douglass v. Redman, 194 S. W. 260, 270 Mo. 465.

II.

The provisions of the 1913 Act could not be made applicable to Drainage District No. 4.

(a) This Court in the Redman case above referred to specifically so ruled in 1917 after the 1913 Amendment.

(b) If it be contended that the 1913 Amendment should be made applicable to Drainage District No. 4, then the 1913 Amendment would be unconstitutional.

Section 15, Article 2, Mo. Cons. 1875;
Section 30, Article 2, Mo. Cons. 1875;
Section 28, Article 4, Mo. Cons. 1875;
Lucas v. Murphy, 156 S. W. (2d), l. c. 690;
Buder v. First National Bank, 16 Fed. (2d), l. c. 992;
Cornet v. St. Louis County, 240 S. W., l. c. 111;
State v. North, 264 S. W., l. c. 681, 304 Mo. 607;
State v. Walker, 34 S. W. (2d), l. c. 131, 326 Mo. 123.

III.

The 1919 Amendment to the County Court Drainage District Law is also not applicable to Drainage District No. 4.

(a) The Redman opinion of this Court when analyzed clearly rules that no subsequent act of the Legislature could affect Drainage District No. 4 which was organized and final judgment of the County Court rendered in 1905.

(b) If it be contended that the 1919 Amendment is applicable to Drainage District No. 4, then such 1919 Amendment would be unconstitutional.

(See authorities cited under II.)

IV.

The fact that the bonds in the Murphy case have been merged into judgment cannot enlarge the powers of the County Court to provide payment of the Murphy judgment by the levy of an assessment against the lands in Drainage District No. 4.

State ex rel. Watkins v. Macon County Court, 68 Mo. 29;

Buchnell v. Drainage District, 111 S. W. (2d) 956, 233 Mo. App. 921.

V.

A reading of the opinion of Judge Davis in Murphy v. Drainage District No. 4, 17 Fed. Supp. 128, and the opinion of the Court of Appeals in Drainage District No. 4 v. Murphy, 119 Fed. (2d) 390, clearly discloses that such cases are not res adjudicata as to the Respondents in this case nor any other landowners in Drainage District No. 4.

See 17 Fed. Supp., l. c. 132;
119 Fed. (2d), l. c. 394.

VI.

It is Respondent's contention that no right ever existed that could grant authority to the County Court to make an additional assessment against the lands in Drainage District No. 4. But assuming that such right existed, the right of enforcement was barred by the statute of limitations long before the assessment made by the County Court in this case in June, 1941.

Sec. 1013, R. S. Mo. 1939;
Stark v. Zehnder, 102 S. W. 992, 204 Mo. 442;
Hoester v. Sammelmann, 14 S. W. 728, 101 Mo. 619;
Lackland v. Smith, 5 Mo. App., l. c. 164."

At page 39, Respondents' Brief, Missouri State Supreme Court, appears the following:

"(a) The 1913 Act on the point in question is violative of Section 15, Article 2, Missouri Constitution of 1875, which was in force at the time of the 1913 Act. This constitutional provision specifically prohibits the General Assembly from passing any law that would impair the obligation of a contract or that would be retrospective in its operation."

At pages 40 and 41, Respondents' Brief, in Missouri State Supreme Court, appears the following:

"Section 30, Article 2, Missouri Constitution, 1875, provides that no persons shall be deprived of their property without due process of law; of course, this action, if successful, would and could deprive Respondents of their property. They were entitled to a day in Court on this assessment, as the Redman case specifically ruled, and for this additional reason the 1913 Act would be unconstitutional wherein the Legislature attempted to declare, without anyone having

their day in Court, that all existing obligations of Drainage Districts were valid the Legislature violated the due process clause of the Constitution."

It is further admitted that the points relied upon, points and authorities and argument as contained in the Respondents' Brief in the Missouri State Supreme Court was limited to those hereinbefore set out.

V. Bon Geaslin,
Langdon R. Jones,
Attorneys for Petitioner in the United States Supreme Court.

David Baron,
Attorney for Respondents in the United States Supreme Court.

EXCERPTS OF THE 1919 ACT.

In 1919 the General Assembly of Missouri enacted a new article to take the place of Article 4 of Chapter 41 of the Revised Statutes of Missouri, 1909, as amended by the Act of 1913, which new article was to be known as Article 4 of Chapter 41. This article contained Section 17 and Section 57, respectively, which became sections 12413 and 12454, respectively, of the Revised Statutes of Missouri, 1939. Section 12454 reads as follows:

"Proceedings pending not to be affected by this article.—The repeal of article 4, chapter 41, R. S. 1909, entitled 'construction and improvement of ditches, watercourses and levees upon petition of one or more landowners,' shall not have the effect of suspending, abating, abridging, impairing, vitiating, or nullifying any right, power, remedy, or lien heretofore given, created or conferred upon any drainage district here-

tofore organized or in process of organization at the time of passage of this article, under any law of this state, but all such rights, powers, remedies and liens are hereby directly preserved to all such drainage districts; nor shall the repealing of existing laws have the effect of suspending, abridging, abating or nullifying any proceeding or proceedings now pending in any court of this state or of the United States; nor shall the repealing of existing laws have the effect of impairing, invalidating, discharging, changing, modifying or destroying any obligation, contract or undertaking, entered into by, or with any drainage district now organized and existing under any law in this state, but all such obligations, contracts and undertakings so entered into shall be and remain inviolate. All rights, powers, liens and remedies now existing in behalf of any drainage district of this state may be enforced and made available under the provisions of this article, if applicable, at the election of the drainage district. This article is hereby declared to be remedial in character and purposes, and shall be liberally construed by the courts in carrying out this legislative intent and purpose."

Section 12413 reads as follows:

"List and schedule remain permanent record—court may provide additional levies, when. The list and schedule specified in section 12412 shall be prepared in the form of a well-bound book which shall be named and indorsed 'drainage tax record of drainage district number ..... of ..... county, Missouri,' which indorsement shall also be printed or written at the top of each page in said book and the same shall be signed by the county clerk, attested by the seal of the county court and shall hereafter remain a permanent record in the office of said clerk. In case the

proceeds of the taxes levied as herein provided are not sufficient to construct the improvements as described in the report of the viewers and engineer as confirmed by the court, then the court shall make, certify and provide for the collection of such additional tax levies as are necessary to complete the improvement: Provided, however, that the aggregate of all such levies, exclusive of taxes levied for interest on bonds, does not exceed the total benefits assessed and confirmed. If any sum be needed to pay any judgment against the district and upon the filing of a certified copy of said judgment with the clerk of the county court, it shall be the duty of the county court, at the next term, to levy sufficient taxes to pay the same and to add thereto sufficient taxes to pay the interest on said judgment. The court shall levy, certify and provide for the collection of said taxes as hereinbefore provided and shall apportion the same to the lands or other property in proportion to the original assessment of benefits, but not in excess thereof, and if in excess thereof then in such proportion as will not, with other lawful tax levies, made and collected be in excess of the benefits reported by the viewers and confirmed by the court."